86-314

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

BARBARA ANN ALLEY
and
W.H. ALLEY,

Petitioners,

vs.

GUBSER DEVELOPMENT COMPANY,
NATIONAL GYPSUM COMPANY, and
WEYERHAUSER COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Attorney for Petitioners

DATED: July 26, 1986

QUESTION PRESENTED

1. Can Plaintiffs in federal court accept a remittitur of punitive damages, then cross-appeal separate and distinct causes of action?

PARTIES BELOW

Petitioners, Barbara Ann Alley and William H. Alley - the plaintiffs-appellees and cross-appellants in the court below - are residents of Colorado.

Respondents, Gubser Development Company, National Gypsum Company, and Weyerhaeuser Company - defendants-appellants and cross-appellees in the court below - are corporations with their

principal places of busines in Oklahoma, Kansas and New York respectively and doing business in Oklahoma.

National Gypsum Company does business in Newton, Kansas as Diversified Manufactured Housing. Gubser Development Company does business in Oklahoma as Best Mobile Homes.

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Barbara Ann Alley and W.H. Alley, Petitioners, pray that the Supreme Court grant a writ of certiorai to review the judgment of the Tenth Circuit Court of Appeals entered on May 28, 1986. The Tenth Circuit reversed for insufficiency of the evidence the award of punitive damages already remitted by the trial court and dismissed the petitioners' cross-appeal of issues separate and distinct from the punitive or compensatory damages issues submitted to the jury.

OPINIONS BELOW

The August 10, 1983 Findings of Fact and Conclusions of Law of the United States District Court of Colorado reported at 569 F.Supp. 36 (D.C. Colo. 1983) is reproduced and appended hereto as Appendix "A".

The March 3, 1986 Opinion of the United States Court of Appeals for the Tenth Circuit is reproduced and appended hereto as Appendix "B".

The May 29, 1986 Denial of Motion for Rehearing by the United States Court of Appeals for the Tenth Circuit is reproduced and appended hereto as Appendix "C".

JURISDICTION

Petitioners seek review of the judgment of the Tenth Circuit Court of Appeals entered March 3, 1986 reversing the award of punitive damages entered on August 31, 1982 and denying petitioners' cross appeal of separate controversies. The Tenth Circuit denied a timely filed Motion for Re-Hearing on May 28, 1986. This petition is filed within 90 days of the Court of Appeals' Denial of Re-Hearing, and jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSITUTIONAL PROVISIONS, ACTS AND STATUTES INVOLVED

United States Constitution, Fifth and Seventh Amendments; The Magnuson-Moss Warranty Act, 15 U.S.C. §2301, et seq.; Colorado State Constitution Article II, 8,

25; Pre and Post Judgment Colorado Interest Statutes; C.R.S. §13-21-101 (1978); and C.R.S. §13-21-102 (1979).

STATEMENT OF THE CASE

William H. and Barbara Ann Alley commenced this action against Weyerhaeuser Company, National Gypsuym Company and Gubser Development Company on July 25, 1980. (R.O.A. p.1). The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, the plaintiffs being citizens of Colorado and defendant Gubser Development Company being a citizen of Oklahoma, defendant National Gypsum Company being a citizen of Kansas and defendant Weyerhaeuser being a citizen of Washington. The Alleys claimed damages for personal injuries and property loss as a result of exposure to formaldehyde gas in

a new "American" mobile home manufactured by National Gypsum Company, d/b/a Diversified Manufactured Housing (DMH) in Newton, Kansas. (R.O.A. p.1). After considerable shopping for a mobile home in which they could live in their retirement years, the Alleys were shown by Best Mobile Homes an "American" home which did not smell. (Tr. p.199). They ordered the same model from Gubser Development Company, an Oklahoma corporation d/b/a Best Mobile Homes. (R.O.A. p.1; Tr. pp.199-200). The purchase included a full one-year written warranty "on all". (Plaintiffs' Exhibit 2).

When the Alleys moved into the home, a sickening formaldehyde odor burned their eyes, noses and throats. (Tr. pp.210, 689). The seller "Best" advised them it was the dye in the rugs, the odor would go away, and they should not worry. (Tr.

p.210). The problem persisted and their complaints were ignored. (Tr. pp.214-215). The Alleys were later told by a "Best" manager that it was common knowledge in the industry that the chemical smell was formaldehyde. (Tr. p.215).

The Alleys called the Health Department in Tulsa, Oklahoma, the EPA and other agencies for help. (Tr. p.1568). They retained an attorney in Oklahoma who called the manufacturer to ask for help. (Tr. p.223). The manufacturer promised to send a factory representative who never came out. (Tr. pp.1551-1152; 1569-1572).

Mr. Alley became sick from what was later diagnosed as toxic hepatitis. (Tr. p.794). As he felt better when visiting his children in Colorado, they decided to move the home there where the weather was cooler and the home could be left open to

the air. (Tr. p.671). In Colorado, the State Health Department measured levels of formaldehyde in the home at .99 parts per million, six months after the purchase. Given the high temperature and humidity in Oklahoma, much formaldehyde had already escaped. (Tr. p.275). The Colorado Attorney General's Office wrote the manufacturer and seller asking for relief. (Tr. p.1568-1569). Gubser Development, the manufacturer, discussed the formaldehyde problem with Weyerhaeuser Company, the supplier of the particle board decking and manufacturer of the wall paneling which released formaldehyde. (Tr. p.1568-72). National Gypsum then offered only a deodorant mask. (Tr. p.215).

Mr. Alley could not work and fell behind in his house payments. (Tr. p.1790). The purchase note was accel-

lerated, demand for payment was made, and the Alleys sought bankruptcy. (Tr. pp.247, 249, 1234).

The Alleys introduced evidence at trial which showed that National Gypsum Company and Weyerhaeuser Company knew that their products released formaldehyde which could render a home uninhabitable. (Tr. p.1514, Plaintiffs Exhibit 331). Nonetheless, they took no action to help the Alleys even after notice. (Tr. p.1568-72).

Prior to trial the court dismissed the Alleys' claim to attorney's fees under the Magnuson-Moss Warranty Act, 15 U.S.C. §23-10(d)(1), based on an erroneous finding that the Alleys did not have any property damage. (Tr. Vol. 1450). In Boelens v. Redman Homes, Inc., 748 F.2d 1058 (5th Cir. 1984) the Fifth Circuit

Court of Appeals held that the loss of mobile home due to formaldehyde odor is property damage.

The jury found for the Alleys on their claims of strict liability, negligence and breach of warranty and awarded Mr. Alley $30,000.00 compensatory and $510,000.00 punitive damages and Mrs. Alley $20,000.00 compensatory damages. (Tr. p.2028). The trial court ordered a remittitur of Mr. Alley's punitive damages from $510,000.00 to $150,000.00, or, alternatively, a new trial on all issues. (R.O.A. p.763-770). The court disallowed the Alley's motion for pre-judgment interest. The Alleys accepted the remittitur under protest. (R.O.A. p.784).

The defendant corporations, Gubser Development and Wyerhaeuser appealed the punitive damage award to the Tenth Circuit

Court of Appeals, which reversed the punitive damage award for insufficiency of evidence. The Alleys tried to cross-appeal the separate controversies of whether they were entitled to attorney's fees under the Magnuson-Moss Act and interest under state law. The Court of Appeals disallowed their cross-appeal of these controversies, holding that the principles stated in Donovan precluded a cross-appeal where plaintiffs were given the choice of accepting the remittitur or a new trial on all issues. This was error. Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623 (4th Cir. 1977).

REASONS FOR GRANTING THE WRIT

This petition presents a basic question of federal jurisdiction, whether a remittitur plaintiff can cross-appeal causes of action separate and distinct

from the order of remittitur. Petitioners urge the Supreme Court to exercise its power of supervision in this case to reverse an unwarranted departure by the Tenth Circuit Court of Appeals from the usual course of allowing plaintiffs to appeal separate controversies in remittitur appeals. Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623 (4th Cir. 1977).

By foreclosing the Alley's chance to seek reinstatement of claims for statutory attorney's fees and interest, issues which are severable from remitted punitive damages, the Tenth Circuit placed itself in direct conflict with all other circuits which have confronted this issue. Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623 (4th Cir. 1977), cert. den. 434 U.S. 923 (1977) (allowed cross-appeal of dismissal of Sherman Act claims after remittitur of

award under claims of fraud and deceit); Baltezore v. Concordia Parish Sheriff's Department, 767 F.2d 202 (5th Cir. 1985) (allowed cross-appeal of dismissal of negligence claim after remittitur of award under wrongful death claim); Ohio-Sealy Mattress Manufacturing Company v. Sealy Incorporated, 585 F.2d 821 (7th Cir. 1978) (allowed cross-appeal of dismissal of claim for injunctive relief after remittitur of award under the damages claim); Aaro, Inc. v. Daewood International Corp, 755 F.2d 1398 (11th Cir. 1985) (allowed cross-appeal of dismissal of claims for certain business expenses and commissions after remittitur of award under claims for other business expenses and commissions).

The general rule accepted in these circuits is stated in Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623, 630 (4th Cir. 1977).

> Plaintiff's action in accepting a remittitur to avoid a new trial on fraud and deceit damages [does not] indicate as a matter of law their assent to a directed verdict entered against them on the anti-trust account of their complaint. We therefore conclude that plaintiffs are entitled to maintain this appeal on the anti-trust count, but not as to the correctness of the remittitur.

The Tenth Circuit Court of Appeals disallowed the Alley's cross-appeal based on a misapplication of this court's holding in Donovan v. Penn Shipping Co., 429 U.S. 648 (1977). In Donovan this Court reaffirmed a holding that a plaintff in federal court may not directly appeal from a remittitur which he has accepted.

The Donovan rule merely precludes a plaintiff's appeal of a remittitur order which he has accepted. The plaintiff can appeal from separate orders, hence the Donovan rule is inapplicable to plaintiff's appeal the dismissal of claims which were not submitted to the jury and were therefore not subject to the remittitur order. Aaro, Inc. v. Daewood International Corp., 755 F.2d 1398 (11th Cir. 1985) citing 6 A.J. Moore, J. Lucas, and G. Grotheer, Jr., Moore's Federal Practice, §59.08[7] (2nd Ed. 1984).

The circumstances in this case are identical to those in G.M. Brod & Co. v. U.S. Home Corp, 759 F.2d 1526 (11th Cir. 1985), in which the Eleventh Circuit allowed without comment plaintiff's cross-appeal of the separate issue of

pre-judgment interest after accepting a remittitur. See generally, Price v. Franklin, 574 F.2d 594 (D.C. Cir. 1978).

The Tenth Circuit expanded the court's remittitur order to include all of the separate controversies in this case because "... the district court ruled as follows with respect to the remittitur.... 'If plaintiffs choose to reject the remittitur, a new trial will be ordered on all issues, ...' (Emphasis added)." Appendix B at 29. This relief is, of course, available in any new trial

The Alleys, however, were not appealing punitive damages or their underlying compensatory claims. Rather, they sought by cross-appeal to address controversies separate from the issues submitted to the finder of fact. Separate controversies are defined as issues which

are so distinct and separate from others that a re-trial of those alone may be had without injustice. Gasoline Products Company v. Champlin Refining Company, 283 U.S. 494 (1931). The jury's finding of liability under the breach of warranty claim was not appealed, thus the issue of whether the defendants are liable under the Magnuson-Moss Warranty Act provisions can be decided based on the appellate record or can be re-tried alone.

The cross appeal of separate controversies establishes fairness by allowing review of claims not submitted to the jury and promotes judicial economy giving both parties reason to settle disputes.

It is important that certiorari be granted in this case to prevent the Tenth Circuit's expansion of a questionable

doctrine, remittitur, a dangerous tool, long criticized for its questionable constitutionality, efficiency and fairness. Dimick v. Scheidt, 293 U.S. 474 (1935) (additur unconstitutional, remittitur begrudgingly approved in dicta becaused of the length of time courts had practiced the procedure); Bonura v. Sea Land Service, Inc., 512 F.2d 671 (5th Cir. 1975) (Goldberg J. dissenting) (denial of rehearing) ("The doctrine of remittitur rests on a constitutional base of clay"); Carlin, Remittitur and Additurs, 49 W.Va.L.Q.1 (1942). In Missouri, the doctrine of remittitur was abolished because it invaded the function of a jury and remittitur cases were appealed despite the finality of the remittitur. Firestone v. Crown Center Redevelopment Corporation, 693 S.W.2d 699 (Mo. banc 1985).

The remittitur practice began with Justice Storey's 1822 circuit court decision where he simply asked for remittitur without authority. Blunt v. Little, 3 F.Cas. 760 (No. 1578) C.C.A. Mass. 1822. The policy was established and is intended to bring finality to a judgment. Northern Pac. R.R. v. Herbert, 116 U.S. 642 (1886); Kennon v. Gilmor, 131 U.S. 22 (1889); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895); Woodworth v. Chesbrough, 244 U.S. 79 (1917).

The practice is complex when put into action, especially because the procedures and standards used by federal courts are not uniform. See generally, Sann, Remittitur Practice in the Federal Courts, 76 Columbia Law Review 299 (1976). This Court has an opportunity with this case to instill uniformity in the practice and

prevent needless expansion of an already groundless principle. Because of the continuing doubts and shaky precedents on which remittitur stands, restraint in unlimited innovation of the remittitur doctrine is urged for protection of the Seventh Amendment right of trial by jury. U.S. Const. amend. VII; 6 A.J. Moore, Federal Practice, §59.05(3) (2d Ed. 1974).

Traditionally, neither plaintiffs nor defendants were allowed to appeal the remittitur after the plaintiffs had accepted it in lieu of a new trial. Woodsworth v. Chesbrough 244 U.S. 79 (1917) and Koenigsberger v. Richmond Silver Mining Company, 158 U.S. 41, 51 (1985).

The expansion of appellate review led to changes in the availability of remittitur appeals, and eventually the

defendant secured a right to appeal a remittitur. Neese v. Southern Ry., 350 U.S. 77 (1955); Smith v. Welch, 189 F.2d 832 (10th Cir. 1951);

Prior to Donovan, some federal courts permitted an appeal of an order granting a remittitur, based on the rationale that the remittitur is sufficiently adverse to the plaintiff to warrant cross-appeal. See Bonn v. Puerto Rico International Airlines, Inc., 518 F.2d 8990 (1st Cir. 1975). Federal courts had liberalized the traditional rule against plaintiffs' appeal of remittitur. United States v. 1160.96 Acres of Land, 432 F.2d 910 (5th Cir. 1970) (when plaintiff accepted "under protest"); Moaney v. Henderson Portion Pack Co., 334 F.2d 7 (6th Cir. 1964) (remittitur appeal allowed under state law); Thomas v. E.J. Korvette, Inc., 329 F.Supp. 1163, 1171 (E.D. Pa. 1971), rev'd

on other grounds, 476 F.2d 471 (3d. Cir. 1973); contra, Collum v. Butler, 421 F.2d 1257 (7th Cir. 1970) (direct appeal).

In Donovan v. Penn Shipping Co., the Supreme Court finally precluded plaintiffs from directly appealing remittiturs they accepted "under protest". The Donovan decision is based on four early Supreme Court cases, all decided before defendants had a right to appeal an order of remittitur. The first was Kennen v. Gilmer, 131 U.S. 22 (1889), in which the plaintiff was not given a choice of a new trial in lieu of remittitur, the Court stated in dicta that an appeal would be disallowed if the plaintiff had consented to the judgment. In Lewis v. Wilson, 151 U.S. 551 (1894), the plaintiff was not allowed to appeal a remitted judgment two years after signing an acknowledgment of satisfaction. In Koenigsberger v.

Richmond Silver Mining Co., 158 U.S. 41 (1895) and Woodworth v. Chesbrough, 244 U.S. 79 (1977), plaintiffs actively sought the remittitur on appeal, thus the Courts' dismissals of the appeals were premised on the plaintiffs' free election of the remittitur.

The Donovan decision disposed of plaintiffs' right to a direct appeal for review of a remittitur, but is silent regarding plaintiffs' right to cross-appeal when a remittitur is appealed by a defendant. Since Donovan, courts extended without basis the prohibition against direct appeal a remittitur by plaintiffs to include cross-appeals. Westerman v. Sears, Robuck & Co., 577 F.2d 873 (1978).

In pre-Donovan remittitur cases, plaintiff appeals offered an appropriate counter-balance to remittitur appeals by

defendants. Without plaintiffs' cross-appeal, a significant procedural advantage is extended to the defendant, a change which threatens to undermine the fundamental fairness of the remittitur doctrine. Note, Procedures to Lessen Remittiturs' Intrusion on the Seventh Amendment Right to Jury Trial, 1979 Wash.U.L.Q. 639 (1979).

In this case, the Tenth Circuit went even further and created a completely risk-free appeal in which defendants receive the benefit of the remittitur and can appeal without jeopardy of separate controversies. This is very attractive to defendants and actively encourages appeal, enlarging the burden on the appellate courts. See Akermonis v. Sea-Land Service, Inc., 688 F.2d 898 (2nd Cir. 1982).

The federal appellate civil caseload has doubled three times since their early years of operation at a rate which is greatly disproportionate to the rate of increase in caseloads at the trial level. Carrington, Crowded Dockets and the Courts of Appeals; The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969). This increased burden impedes the appellate functions of judicial review, institutionalization of decisions and creating a stable body of national law, thus restraint is necessary. Carrington supra at 555. The appellate court crises may be relieved by restraint of the remittitur.

CONCLUSION

A remittitur plaintiff's right to appeal separate controversies advancces a significant goal of judicial economy and

limits the unconstitution impact of the remittitur's intrusion on the jury function. The Tenth Circuit's expansion of the Donovan principle threatens to undermine the effectiveness of the appeal process in mitigating negative impact of remittitur by allowing defendnats a risk-free unopposed appeal of remittitur.

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

No. 80-Z-986

BARBARA ANN ALLEY and W.H. ALLEY,

Plaintiffs,

vs.

GUBSER DEVELOPMENT CO., an Oklahoma corporation; NATIONAL GYPSUM COMPANY, a Delaware corporation d/b/a DMH COMPANY; WEYERHAEUSER COMPANY, a Washington corporation; and LOUISIANA-PACIFIC CORPORATION, a Delaware corporation,

Defendants.

Order from the United States District Court for the District of Colorado

Decided and Filed August 10, 1983

Before: Zita L. Weinshienk, Judge

Action was brought against various defendants, alleging breach of implied warranty of merchantability, negligent failure to warn, and products liability, relating to defendants' use of materials containing urea-formaldehyde in construction of mobile home. After judgment was rendered in favor of plaintiffs, defendants filed various posttrial motions. The District Court, Weinshienk, J., which had presided over the trial, held that: (1) evidence was sufficient to warrant finding that there was urea formaldehyde in plaintiffs' mobile home and that it caused injury; (2) compensatory damages awards were not excessive; (3) evidence was sufficient to create inference that management personnel of each defendant corporation knew of potential problems caused by exposure to urea formaldehyde, and hence, corporations could be held liable for punitive damages; and (4) punitive damages award of $510,000 in favor of man who sustained various personal and economic injur-

ies as a result of exposure to urea formaldehyde was so disproportionate to $20,000 compensatory damages award as to shock the judicial conscience, and remittitur would be ordered to reflect award in total amount of three times the compensatory award given to man and his wife, resulting in $150,000 in punitive damages; denial of motions for new trial would be conditioned upon acceptance of the remittitur.

So ordered.

John S. Evangelisti, LaFond & Evangelisti Denver, Colo., for plaintiffs.

Hugh Q. Gottschalk, Holland & Hart, Denver, Colo., for Gubser Development Co. and National Gypsum Co.

Richard L. Schrepherman, O. Russell Murray, Holme, Roberts & Owen, Denver, Colo., for Weyerhaeuser Co.

Christopher M. Brandt, Wood, Ris & Hames, P.C., Denver, Colo. for Louisiana-Pacific Corp.

ORDER

WEINSHIENK, District Judge.

Plaintiffs Barbara Ann and William H. Alley, husband and wife, sued the defendants, Gubser Development Company (Gubser), National Gypsum Company (National Gypsum), Weyerhaeuser Company (Weyerhaeuser), and Louisiana Pacific Corporation (Louisiana-Pacific), for injuries and losses allegedly caused by the manufacture and sale of a mobile home which the plaintiffs purchased and lived in for six months in 1978. Jurisdiction was based on diversity of citizenship. 20 U.S.C. §1332. Plaintiffs relied upon three theories of liability: breach of implied warranty of merchantability, negligent failure to warn and products liability.

The case was tried to a jury of seven, which returned a verdict for plaintiffs and against defendants as follows: $20,000 in compensatory damages for Mrs. Alley; $30,000 in compensatory damages for Mr. Alley; and punitive damages for Mr. Alley against

Gubser in the amount of $10,000, against National Gypsum in the amount of $200,000, against Weyerhaeuser in the amount of $150,000, and against Louisiana-Pacific in the amount of $150,000. Judgment was entered on August 31, 1982; a stay of execution of the judgment was granted on September 10, 1982.

The case is now before the Court on the post-trial motions filed by the defendants. These include: (1) Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, by defendants Gubser and National Gypsum; (2) Defendant Louisiana Pacific Corporation's Motion to Alter or Amend Judgment or for Judgment Notwithstanding the Verdict or for Remittitur or New Trial; and (3) Motion of Defendant Weyerhaeuser Company for Judgment Notwithstanding the Verdict on Punitive Damages; or to Alter or Amend Judgment; or, in the Alternative, for Remittitur or a New Trial on all Claims. Memorandum Briefs were filed by each defen-

dant in support of these motions. Plaintiffs filed a Reply to Defendants' Motions to Amend and for New Trial, and all defendants filed reply memoranda. There also have been supplemental memoranda filed by all parties.

The Court has considered all of these motions and memoranda, the relevant case law, and all the facts and circumstances of the case, and now is prepared to rule on the defendants' motions.

The issues raised by defendants fall into two main categories: (1) issues involving compensatory damages, including (a) whether there was sufficient evidence to support the verdicts; and (b) whether the amounts awarded were excessive; and (2) issues involving punitive damages, including (a) whether punitive damages were barred by the statute of limitations found in C.R.S. 1973 §13-80-104; (b) whether exhibits were properly admitted against defendants Weyerhaeuser and Louisiana-Pacific; (c) whether there was sufficient evidence to support an

award of punitive damages; and (d) whether the award of punitive damages was excessive.

I. COMPENSATORY DAMAGES

Defendants argue that there was insufficient evidence to support the award of compensatory damages to plaintiffs, urging that there was no showing that their products offgassed urea formaldehyde, nor that there was any causal connection between the presence of urea formaldehyde and the injuries suffered by the plaintiffs. More specifically, they point out that the elements of permanent injury, loss of credit, loss of reputation and impairment of earning capacity were all removed from the case. They further urge that because the evidence indicated that the plaintiffs bankruptcy and anxiety were caused by facts other than the presence of urea formaldehyde in the mobile home, and because the evidence relating to the liver attack of Mr. Alley was supported only by the testimony of James R. Beall, Ph.D., the resulting verdicts were both unsupported by the evi-

dence and excessive.

In addition, Louisiana-Pacific argues that the evidence tying it to the manufacture of the particleboard was insufficient because the number on the piece of particleboard taken from the plaintiffs' home, Exhibit 102, was illegible; the testimony of Ron King was improperly admitted; and Exhibit 154, which indicated that the defendant used mill number "42," was also improperly admitted.

The Tenth Circuit has set down guidelines for determining an award by a jury of either compensatory or punitive damages can be set aside:

> We have said that absent an award so excessive as to shock the judicial conscience and to raise an irresistable inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate. Metcalfe v. Atchison, Topeka and Santa Fe Railway Co., 491 F.2d 892, 898 (10th Cir.) ... Such bias, prejudice, or passion can be inferred from excessiveness. Wells v. Colorado College, 478 F.2d 158, 162 (10th Cir.) ... However, a verdict will not be set aside on this bias unless it is so plainly excessive as to suggest that it was the product of

> such passion or prejudice on the part of the jury....
>
> Such cases recognize the principle that if the court determines that the verdict was the result of passion or prejudice, or for any other reason it appears that the jury erred or abused its discretion not only on the issue of damages but also on the issue of liability, the court must unconditionally order a new trial and cannot give the plaintiff the option to accept a lesser amount....
>
> However, another remedy is also recognized. Where the court concludes there was error only in an excessive damage award, but not one also tainting the finding of liability, the appellate court may order a remittitur and alternatively direct a new trial if the plaintiff refuses to accept the remittitur, a widely recognized remedy. See Holmes v. Wack, 464 F.2d 86, 89 and n.3 (10th Cir.) ....

Malandris v. Merrill Lunch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152 at 1168 (10th Cir. 1981) sustained on rehearing en banc, March 31, 1983. (Footnote and citations omitted).

[1,2] Although plaintiffs presentation on liability issues was based primarily on circumstantial evidence and inference, there was sufficient evidence to support a finding that there was urea formaldehyde in plaintiffs home and that it did cause injury to the

plaintiffs. The jury so found. This Court does not conclude that the compensatory damage awards are so excessive as to shock the judicial conscience, and, thus, will not substitute her judgment for that of the jury. See Burns v. McGraw-Hill Broadcasting, 659 P.2d 1351, 1355-6 (Colo. 1983). The awards of compensatory damages will not be disturbed. The admissibility of the testimony of Mr. King and of Exhibit 154 were reviewed at trial, and the Court finds that both were properly considered by the jury.

Defendants' motions for judgment notwithstanding the verdict or for an altered or amended judgment or for remittitur will therefore be denied as to compensatory damages.

II. PUNITIVE DAMAGES

A. Statute of Limitations

[3] All defendants argue that allowing punitive damages to be considered by the jury was error because this is an action involving a penalty, and punitive damages are

therefore barred by the one year statute of limitations provided in C.R.S. 1973 §13-80-104. The Court's earlier holding that the claim for punitive damages is not barred by this statute of limitations is correct. The plaintiffs' claim is based on the underlying tort claim, and is not just a suit for penalty under §13-80-104. See Dorney v. Harris, 482 F.Supp. 323, 325 (D. Colo. 1980), and Griffin v. Pate, 644 P.2d 51, 53 (Colo. App. 1981).

B. Admissibility of Exhibits

[4] 1. Weyerhaeuser: Defendant Weyerhaeuser argues that the Court erred in admitting Exhibits 266, 302, 320, 331, and 352, all of which relate to the issue of whether punitive damages should be allowed against this defendant. The Court carefully considered the question of the admissibility of these documents at trial. The documents were properly admitted as statements against interest, and will remain as a part of the record.

2. Louisiana-Pacific: Defendant Louisiana-Pacific objects to the admission of Exhibit 154 on the ground that it was not listed in the Pre-Trial Order, and was therefore wrongfully admitted into evidence. Defendant argues that, without this exhibit there is no evidence tying Louisiana-Pacific to the manufacture of the particleboard. Defendant also objects to the admission of Exhibits 155, 157, 163 and 187 on the ground that they do not fall within an exception to the hearsay rule. These issues were considered at length at the Pretrial Conference on August 8, 1982, at which time the Court decided that the documents were admissible. The documents will remain as a part of the record.

C. Sufficiency of the Evidence

[5] Defendants argue that before a corporation can be held liable for punitive damages, it must be shown that the corporate management authorized or approved the culpable conduct or participated in the wrong. This is a correct statement of the law in

Colorado. See Malandris, supra, at 1174.

[6] Weyerhaeuser argues that there was no evidence that management was aware of the harmful characteristics of urea formaldehyde, or that people named in disputed Exhibits 266, 302, 331 and 352 were part of Weyerhaeuser's management. Gubser, National Gypsum and Louisiana-Pacific also argue that there is no evidence that the management of the three corporations were aware of or participated in the conduct which caused the plaintiffs' injury.

However, the Court concludes, as a matter of law, that there was sufficient evidence to create an inference that management personnel of each defendant corporations knew of the potential problems caused by exposure to urea formaldehyde. Testimony of Bill Watkins, an employee of Gubser, revealed that the doors of the newly manufactured mobile homes had to be tied open in order to keep the formaldehyde odor from permeating the home. The disputed exhibits

listed above and offered against Weyerhaeuser are sufficient to create an inference that management employees of the corporation were aware of the urea formaldehyde problem. Exhibits 136 and 137, offered against National Gypsum, and Exhibits 157 and 163, offered against Louisiana-Pacific, are also sufficient to create such an inference.

The award of punitive damages will not be disturbed on the grounds that the corporate management of defendants did not know of or participate in the wrongful conduct.

D. The Excessiveness of the Punitive Damages

Defendants also argue that the award of punitive damages was grossly excessive, that it was not related to the award of compensatory damages, that it shocks the conscience, and that it was the result of passion and prejudice on the part of the jury.

[7,8] The purpose of punitive damages is to punish the wrongdoer and to deter similar conduct in the future and by others.

Frick v. Abell, 602 P.2d 852, 853-4 (Colo. 1979). Several factors must be taken into consideration in determining whether an award of punitive damages is excessive: (1) whether is bears some reasonable relation to the actual damages awarded; (2) the degree of malice involved; (3) the gravity of the plaintiff's injury; (4) the desire for meaningful punishment. Taylor v. Sandoval, 442 F.Supp. 491 (D. Colo. 1977). The Court in Taylor found that there is no precise mathematical ratio for determining the reasonableness of the punitive damage award. However, it has been held in the Tenth Circuit that an award of punitives can be "[s]o extremely disproportional that we must assume that the jury acted either with passion or prejudice...." Dearmore v. Gold, 400 F.2d 887, 888 (10th Cir. 1968). In the Dearmore case, a ratio of punitive to compensatory damages of 11:1 was struck down as being excessive.

[9] The award of punitive damages to

Mr. Alley was $510,000. Mr. Alley was found to have suffered $30,000 in actual damages, and Mrs. Alley, $20,000. The ratio of punitive to compensatory damages for Mr. Alley is 17:1. Even if the compensatory awards are combined, the ratio of punitive to actual damages is greater than 10:1.

This Court finds this to be a disproportion that is "so excessive ... as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice ... or other improper cause invaded the trial." See Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962). See also Malandris, supra, at 1168.

In so finding, the Court has considered the many factors set out by the Colorado courts as they apply to this case: the extent of the plaintiffs' harm was not so great as to merit an extremely high punitive award; the award of punitives was not reasonably related to the compensatory damages; the plaintiffs did not prove a high degree of

malice on the part of the defendants.

The punitive damage award will therefore be reduced, in order to effect a more reasonable relationship between the compensatory and punitive damage awards and yet not defeat the purpose behind the punitive awards. The defendants must still be made to feel the "sting" of the jury's finding that they acted with a wanton and reckless disregard of the plaintiffs' rights and feelings. The punitive award must retain its deterrent effect.

Although the Court finds that the punitive award was excessive and unreasonable in view of the evidence and the injuries sustained by the plaintiffs, thereby inferring that the punitive award was the result of a passion or prejudice on the part of the jury, the Court finds that the liability determination was not similarly tainted. See Malandris, supra, at 1168. Had the entire trial been so tainted, the Court would have no choice but to order a new trial.

Under the circumstances here, however, the Court will order a remittitur, conditioned on the plaintiffs' acceptance of the reduced punitive damages award. If the plaintiffs choose to reject the remittitur, the Court will grant the defendants' motions for a new trial. See Holmes v. Wack, 464 F.2d 86, 89 (10th Cir. 1972).

A remittitur of the punitive award to a total amount that is three times the combined compensatory awards given to the plaintiffs, $150,000, will therefore be ordered. This amount will be apportioned based on the original punitive damages awards, as follows:

National Gypsum	$58,800
Weyerhaeuser	$44,150
Louisiana-Pacific	$44,150
Gubser Development	$ 2,900

Plaintiffs will have 20 days from the date of this Order in which to accept or reject the remittitur. If they choose to reject the remittitur, a new trial will be ordered on all issues, because a trial on the issue of punitive damages alone would create

undue confusion. See Malandris, supra, at 1178.

III. STATUTE OF LIMITATION ISSUE

[10] Defendant Louisiana-Pacific again raises the issue of whether the plaintiffs' claims against the company were barred by the three year statute of limitations provided in C.R.S. 1973 §13-80-127.5. The defendant has raised this issue several times before. The Court will once again deny the defendant's motion, and hereby incorporates by reference, as if fully set forth, the oral conclusions of law previously made.

It is therefore, ORDERED that all defendants' motions are denied except to the extent that a remittitur is ordered as set forth above. If plaintiffs reject the remittitur, the motions for new trial on all issues will be granted. It is

FURTHER ORDERED that the plaintiff shall notify the Court of the acceptance or rejection of the remittitur by August 30, 1983.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 83-2415, 83-2423 and 83-2424

BARBARA ANN ALLEY
and
W.H. ALLEY,

Plaintiffs-Appellants,
Cross-Appellees,

vs.

GUBSER DEVELOPMENT COMPANY,
NATIONAL GYPSUM COMPANY and
WEYERHAEUSER COMPANY,

Defendants-Appellees,
Cross-Appellants.

On Appeal from the United States District
Court for the District of Colorado

Decided and Filed March 3, 1986

Before: Barrett, McWilliams and Anderson,
Circuit Judges.

FACTS

In April, 1978, the Alleys, after considerable "shopping," purchased a new "American" mobile home from Gubser d/b/a Best Mobile Homes (Best). At the time Best was a dealer for NGC, the manufacturer of the home. The home was built April 24, 1978, in accordance with a special order placed by Best with NGC on behalf of the Alleys. The Alleys moved into the home on April 27, 1978. Immediately after occupying the home the Alleys were bothered by an odor which burned and stung their eyes, noses, and throats. The Alleys complained to Best employees who related that the odor came from formaldehyde releasing products in the home, that the Alleys should "air-out" the home, and that the smell would go away.

Although the smell did not go away, the Alleys continued to reside in the home throughout the summer months. During this time the Alleys made a number of complaints to Best and others about the smell in their home. The Alleys were also treated by several doctors for various ailments, including Mr. Alley's treatment for hepatitis.

In August of 1978, the Alleys decided to move to Denver, Colorado, and soon thereafter the Alleys arranged to have their home moved to Colorado. After relocating in Colorado, the Alleys fell behind on their home payments. They filed for bankruptcy and vacated the home on November 18, 1978.

On July 25, 1980, the Alleys brought suit against Gubser, NGC, and Weyerhaeuser[2], seeking damages for permanent

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[2]Neither Georgia Pacific nor Louisiana Pacific who were subsequently joined as parties are before us on appeal.

personal injuries and property loss as a result of exposure to formaldehyde gas in their home. The Alleys' complaint raised claims of enterprise liability, strict liability, negligence, breach of warranty, and alleged violations of the Consumer Product Safety Commission Act, the National Manufactured Home Construction and Safety Standards Act and the Magnuson-Moss Warranty Act.

TRIAL

At trial, which extended over two weeks, the Alleys testified in detail relative to the problems created by the odor in their home and their attempts to have the problem corrected. Clarence Lott, a chemist for the Colorado Department of Health testified for the Alleys. He stated that products containing urea-formaldehyde can "off-gas" low levels of formaldehyde, and that at the time the air was tested in the Alleys'

home, formaldehyde levels between .49 and .97 parts per million (ppm) were detected. Lott did not identify the source of formaldehyde in the home.

Dr. Beall, a board certified toxicologist, also testified as an expert for the Alleys. Dr. Beall testified, inter alia: there is a wide variability of individual sensitivity to formaldehyde; various wood products, including particle board, can off-gas formaldehyde; reports as early as 1905 discussed the effects of formaldehyde on people; and that in the 1970's there was information produced and circulated by "industry" on ways to mitigate or decrease the levels of formaldehyde that may be irritating to a person owning a mobile home. Although Dr. Beall did not define what he meant by "industry", the court allowed him to

testify that, in his opinion, "industry" should have warned the public of the effects of formaldehyde.

The Alleys also presented the testimony of Edna Conyers who purchased the mobile home in October, 1979, less than one year after the Alleys vacated it. She testified that the home had an odor when she first moved into it but that "after you live in there a while, cooking odors and smoke and things like that kind of mask it (odor)." R., Vol. XVI at 736. She did not indicate any dissatisfaction with the home.

During trial Weyerhaeuser stipulated that it produced the paneling in the Alleys' home, that the paneling was produced from plywood "blanks," and that the adhesive used to glue the "blanks" together included urea-formaldehyde. Weyerhaeuser acknowledged that during the first four months of 1978, it sold

particle board to the plant that built the Alleys' home and that all of the particle board it sold to the plant was purchased from Louisiana Pacific.

Throughout the trial the defendants defended on the basis that although they were aware of the odor related problems with formaldehyde, they were unaware of the serious health related problems as alleged by the Alleys. The defendants introduced the testimony of Dr. Kornberg, who stated that none of Mr. Alley's medical problems "can be related to his formaldehyde exposure at that time," and that "the exposure was insufficient to cause any permanent damage of any sort; and the substance is not known to cause problems at this concentration beyond a very short period." Id. at 996.

The trial court admitted several exhibits proffered by the Alleys to which NGC and Weyerhaeuser vigorously objected.

First, NGC objected to Plaintiffs' Exhibits 136 and 137 which detailed the odor problems encountered by a purchaser of an American mobile home in November, 1969. While stipulating to the authenticity of the letters, NGC argued that the letters were unsubstantiated and overly prejudicial because they contained the statement that the odor in the home nauseated the owner, who was pregnant, and that her doctor had suggested that she stay somewhere else during the last month of her pregnancy.

Second, Weyerhaeuser also vigorously objected to the court's admission of Plaintiffs' Exhibits 266, 302, 320, 352, and 331. These exhibits, which were obtained from Weyerhaeuser files, discussed formaldehyde odor problems emanating from particle board and the need to correct the problem. Although Weyerhaeuser acknowledged the fact that

the exhibits came from its files and "appeared" to be on Weyerhaeuser's stationary, Weyerhaeuser argued that the documents were irrelevant because they all related to particle board and not to paneling; thus, because it did not manufacture any of the particle board in the Alley home, but only the paneling, the exhibits were inadmissible.

Prior to admitting the exhibits, the trial court specifically ruled that Weyerhaeuser could not be held liable on an enterprise theory on the particle board:

> THE COURT: Well are you going to have any evidence to connect it up -- no, I don't think we can connect it up, because you haven't told me where in the complaint the allegation is. There is simply no enterprise liability theory against Weyerhaeuser on the particle board in your complaint.
>
> * * *
>
> That is the court's opinion; and I think that is very clear in the complaint, and there is just

> no allegation of enterprise liability against Weyerhaeuser on the particle board.

The court will rule that that is not the case. R., Vol. XX at 1125-1126. Inasmuch as Louisiana-Pacific had manufactured the particle board in the Alleys' home, Weyerhaeuser was dismissed on an enterprise liability theory with respect to the particle board. However, Weyerhaeuser remained in the case with respect to particle board on claims of implied breach of warranty, products liability, and negligent failure to warn.

MOTIONS FOR DIRECTED VERDICT

Approximately midway through presentation of their defense, Weyerhaeuser and NGC moved for directed verdicts. In arguing for a directed verdict dismissing all the Alleys' claims against it, Weyerhaeuser contended that there was insufficient evidence to support a finding that its paneling in the Alley home had

off-gassed, much less that it off-gassed to an extent sufficient to create the injuries of which the Alleys complained. (R., Vol. XXI at 1358-1359.) Weyerhaeuser further argued for a directed verdict on all claims for punitive damages on the basis that although the evidence established "an awareness of an odor problem," there was "no evidence that Weyerhaeuser knew that the paneling could cause physical harm to people and acted with a wanton and reckless disregard of the harm to people that might be caused by disregarding that concern." Id. at 1365.

NGC moved for a directed verdict by incorporating Weyerhaeuser's motion in total. Id. at 1378., In its motion for a directed verdict on Alleys' punitive damage claim, NGC argued, inter alia: Alleys' complaints were directed to an odor problem; the Alleys did not make health related complaints and did not

relate any serious problems to Best or NGC; although Best and NGC may not have properly responded to the Alleys' complaints about smell in the home, which gave rise to the level of negligence, there is no evidence that the actions of Best and NGC gave rise to willful and wanton conduct supportive of punitive damages. Id. at 1380-86.

Prior to ruling on Weyerhaeuser's and NGC's motions for a directed verdict, the district court observed:

> It has been pointed out in the arguments by defendants what the plaintiff could have done and what they have not done in making a presentation in this case. Normally in a products liability case, there is an expert witness who specifically says this product is defective in that expert's opinion and why it is defective. We have not had such an expert in this case. I don't know what the problem has been. From the literature that I have looked at, including all the exhibits that haven't come in, it looks like there surely should have been such an expert to testify; but the closest we've come is Dr. Beall, who really didn't testify at any length about wood product and

> specifically did not testify about any testing he did on the floor board or the wall paneling.
>
> However, the Court certainly has to consider inferences -- reasonable inferences, circumstantial evidence, and try to make this decision as fair as we can at this point to the Plaintiff; and when the Court is in doubt, which I am on a couple areas, I will resolve those doubts by letting it go to the jury.

R., Vol. XXII at 1449-50.

Thereafter the district court granted NGC's and Weyerhaeuser's motions for a directed verdict on the following claims: Magnuson-Moss, because "there is no evidence of any damage to property or direct damage in this case" (R., Vol, XXII at 1450); impaired earning capacity, "there is no reasonable inference that can be drawn that he has impaired earning capacity ... nor is there any evidence of permanent physical injury," id. at 1450-1451; lost reputation, "no ... evidence that the plaintiffs have lost

their reputation in any way" id.; lost credit, "no evidence of impaired credit" id. at 1452; and enterprise liability, "is no longer in the case" id. However, the court denied NGC's and Weyuerhaeuser's motions for a directed verdict on the Alleys' claims for punitive damages. In so doing, the court, after noting its concern about the claims, found that the claims should remain in the case. The court then ruled that the following causes of action would be presented to the jury: implied warranty of merchantability, product liability, and negligent failure to warn.

After all the parties had rested, the defendants renewed their motions for directed verdicts. (R., Vol. XDXIV at 1965, et seq.) These motions were denied and the case was presented to the jury. At the time the jury received the case, the Alleys had presented evidence which

tended to establish: their purchase of the home; Louisiana-Pacific as the manufacturer of the particle board in the home; Weyerhaeuser as the supplier of the particle board and the manufacturer and supplier of wood paneling in the home; the presence of formaldehyde in the home (without identifying the source of the formaldehyde); complaints to various individuals and entities about the smell in their home; periods of illness which for both Mr. and Mrs. Alley required medical treatment while residing in the home (yet the Alleys acknowledged that they did not tell their doctors about the formaldehyde); people have different reactions to formaldehyde; moving their home from Oklahoma to Colorado; petitioning for bankruptcy; and vacating the home. The Alleys also acknowledged that Mr. Alley had fully recovered form his hepatitis.

The defendants had presented evidence which tended to establish that: they were aware of smell related problems caused by formaldehyde but not health related problems as alleged by the Alleys; the Alleys' health problems during the time they resided in the home were not related to the formaldehyde in the home; Mr. Alley could not have recovered from his hepatitis, had it actually been formaldehyde induced, because he continued to live in the home during his recovery (which was unrebutted); and that the Alleys did not have to file for bankruptcy but did so on the erroneous advice of their attorney.

The jury returned a verdict in favor of the Alleys and awarded: $20,000.00 in compensatory damages to Mrs. Alley; $30,000.00 in compensatory damages to Mr. Alley. The jury also awarded punitive damages to Mr. Alley against: Gubser in the amount of $10,000.00; NGC in the

amount of $200,000.00; Weyerhaeuser in the amount of $150,000.00; and Louisiana-Pacific in the amount of $150,000.00.

POST-TRIAL MOTIONS

The defendants filed three post-trial motions. Gubser and NGC moved for judgment n.o.v. or, in the alternative, a new trial. Louisiana-Pacific moved to alter or amend the judgment, or alternatively for judgment n.o.v., for remittitur or for a new trial. Weyerhaeuser moved for judgment n.o.v. on punitive damages, to alter or amend judgment, or, alternatively, for remittitur or a new trial on all claims.

After a review of the motions and memoranda, the court entered an order upholding the compensatory damage awards and remitting the punitive damage awards. In upholding the compensatory damages awarded to the Alleys the court, after quoting from Malandris v. Merrill Lynch,

Pierce, Fenner & Smith, Inc., 703 F.2d 1152 (10th Cir. 1983), cert. denied, 464 U.S. 824 (1983), ruled that although the evidence was largely circumstantial, there was evidence to support a finding that there was urea-formaldehyde in the Alleys' home and that it caused injury to the Alleys.

In remitting the punitive damages awarded to Mr. Alley from $510,000.00 to $150,000.00, the court found:

> The purpose of punitive damages is to punish the wrongdoer and to deter similar conduct in the future by others. Frick v. Abell, 602 P.2d 852, 853-54 (Colo. 1979). Several factors must be taken into consideration in determining whether an award of punitive damages is excessive: (1) whether it bears some reasonable relation to the actual damages awarded; (2) the degree of malice involved; (3) the gravity of the plaintiff's injury; (4) the desire for meaningful punishment. Taylor v. Sandoval, 442 F.Supp. 491 (D. Colo. 1977). The Court in Taylor found that there is no precise mathematical ratio for determining the reasonableness of the punitive damage award. However, it has been held in the Tenth Circuit that an award of punitives can be "[s]o

extremely disproportional that we must assume that the jury acted either with passion or prejudice...." Dearmore v. Gold, 400 F.2d 887, 888 (10th Cir. 1968). In the Dearmore case, a ratio of punitive to compensatory damages of 11:1 was struck down as being excessive.

The award of punitive damages to Mr. Alley was $510,000.00. Mr. Alley was found to have suffered $30,000.00 in actual damages, and Mrs. Alley, $20,000.00. The ratio of punitive to compensatory damages for Mr. Alley is 17:1 . Even if the compensatory awards are combined, the ratio of punitive to actual damages is greater than 10:1.

This Court finds this to be a disproportion that is "so excessive ... as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice ... or other improper cause invaded the trial." See Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962). See also Malandris, supra, at 30.

In so finding, the Court has considered the many factors set out by the Colorado courts as they apply to this case: the extent of the plaintiffs' harm was not so great as to merit an extremely high punitive ward; the award of punitives was not reasonably related to the compensatory damages; the plaintiffs did not prove a high degree of malice on the part of the defendants.

> The punitive damage award will therefore be reduced, in order to effect a more reasonable relationship between the compensatory and puntive damage awards and yet not defeat the purpose behind the punitive awards. The defendants must still be made to feel the "sting" of the jury's finding that they acted with a wanton and reckless disregard of the plaintiffs' rights and feelings. The punitive award must retain its deterrent effect.

R., Vol. IV at 768-69. The judgment, as remittited was accepted "under protest" by the Alleys.

ISSUES

I.

Weyerhaeuser and NGC contend the evidence is insufficient to support an award of punitive damages and the district court erred in denying their motions for a directed verdict on the punitive damages claim. We agree and hold that the district court erred in submitting the issue of punitive damages to the jury.

In Colorado exemplary damages are a creature of statute. Mince v. Butters, 616 P.2d 127, 128 (Colo. 1980). Exemplary damages may be recovered under section 13-21-102, C.R.S. 1973, which provides as follows:

> In all civil actions in which damages are assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to he actual damages sustained by such party, may award him reasonable exemplary damages.

The standard of proof to recover exemplary damages is also prescribed by statute. "Exemplary damages ... shall only be awarded in a civil action when the party asserting the claim proves beyond a reasonable doubt the commission of a wrong under the circumstances set forth in section 13-21-102...." C.R.S. 1973 § 13-25-127(2). Therefore, in order to

recover exemplary damages under Colorado law, the plaintiff must prove beyond a reasonable doubt that the injury inflicted by the defendant was "attended by circumstances of fraud, malice or insult, or a wanton or reckless disregard" of the plaintiff's rights and feelings.

In cases properly involving punitive damage claims, it is within the province of the jury to determine the proper amount of punitive damages. The question of the sufficiency of evidence to justify an award of exemplary damages, however, is question of law for the court. Mince v. Butters, 616 P.2d 127-29 (Colo. 1980). For instance, in disposing of a motion for a directed verdict on a punitive damage claim, the Colorado Supreme Court has held that the district court must determine whether, viewing the evidence in a light most favorable to the plaintiff, "a reasonable jury could find beyond a

reasonable doubt that [defendant's] injury-causing conduct was 'attended by circumstances of fraud' or a 'wanton and reckless disregard of the injured party's rights and feelings' as provided in section 13-21-102." Palmer v. A.H. Robins, Co., 684 P.2d 187, 218 (Colo. 1984). In our view there is no evidence in the record from which a reasonable jury could find such conduct.

The defendants in this case were found liable under one or more theories for the injuries sustained by the plaintiffs, as evidenced by the jury's award of compensatory damages. There is, however, no evidence in the record to show that the defendants' conduct should be punished or deterred. "Conduct which is merely negligent cannot serve as a basis for a punitive damage award." Sunward Corp. v. Dunn & Bradstreet, 568 F. Supp. 602, 608 (D. Colo. 1983), citing Frick v. Abell,

198 Colo. 508, 602 P. 2d 852 (Colo., 1979). Nor can selling a product in a condition unreasonably dangerous to the user or consumer under section 402A of the Restatement (Second) of Torts serve as the sole basis for a punitive damage award. Damages are awarded under either a negligence or a strict liability claim to compensate the plaintiff for actual losses. In contrast, "[a] punitive damges claim ...is calculated to punish wrongful conduct and to deter a repetition of that conduct." Palmer v. A.H. Robins, Co., 684 P.2d at 217-18.

Upon review of the record it appears that plaintiffs base their punitive damage claim on defendants' "conduct" of constructing mobile homes with wood products containing formaldehyde which plaintiffs allege was in wanton and reckless disregard of their rights. See, Malandris v. Merrill Lynch, Pierce, Fenner

and Smith, 703 F.2d 1152, 1177 (10th Cir. 1981), cert. denied, 464 U.S. 824 (1983) (nature of the act which caused the injury is to be considered.) The Colorado Supreme Court has defined the phrase "wanton and reckless disregard" in the exemplary damage statute as follows: "If, conscious of this conduct and the existing conditions, he [defendant] knew or should have known, that the injury would probably result, the requirements of the statute are met." Foster v. Redding, 97 Colo. 4, 45 P.2d 940-41 (1935) (emphasis added). The record fails to establish that the defendants did anything other than conform to industry standards in producing the wood products and in constructing the mobile home. Therefore under the plaintiffs' theory, the "wrongful conduct" sought to be deterred is the mobile home

industry's practice of constructing mobile homes with wood products containing formaldehyde.

The evidence admitted at trial shows the defendants had knowledge that formaldehyde caused unpleasant odors and minor irritation when it off-gassed from their wood products. Evidence against Weyerhaeuser was introduced showing that employees at the wood products' plant experienced some of these symptoms. In addition, an internal report was offered to show that Weyerhaeuser knew these symptoms were caused by formaldehyde. Evidence introduced against NGC consisted of several letters written by one customer over a period of time in which the customer complained of odors and irritation. The evidence admitted also showed that these problems can usually be alleviated with minimal ventilation or certain other precautions. Customer and

employee complaints regarding off-gassed formaldehyde are infrequent and are easily resolved by remedial measures.

In submitting the issue of punitive damages to the jury, the district court would have to conclude that a reasonable jury could find that the industry's use of wood products containing formaldehyde is a wanton and reckless disregard of the plaintiffs' rights such that defendants knew or should have known it would probably cause the plaintiffs' injury. There is simply no evidence in the record to support such a finding, which in effect would determine that the industry's practice of using these wood products in mobile homes is unreasonable per se. The only evidence in the record to support such a finding consists of a few isolated consumer complaints regarding odors and minor irritation. This simply falls short

of the evidence required to show that injury would probably result from defendants' conduct.

Applying these standards, we must hold that the district court erred in denying NGC and Weyerhaeuser's motions for a directed verdict on punitive damages and permitting the issue to go to the jury. Viewing the evidence in a light most favorable to the plaintiffs and drawing all reasonable inferences to support the verdict, we cannot hold that a reasonable jury could find beyond a reasonable doubt that defendants' conduct as a "wanton and reckless disregard of the injured party's rights and feelings" as required under section 13-21-102.

II.

In their cross appeal, the Alleys challenge the district court's remittitur of punitive damages, denial of attorneys' fees under the Magnuson-Moss Act, and the

denial of prejudgment interest. The Alleys contend that they have the right to appeal the remittited judgment, including the court's remittitur of punitive damages, denial of attorney's fees under the Magnuson-Moss Act, and the denial of prejudgment interest which they accepted under protest. The defendants contend that the Alleys' acceptance of the remittitur waives their objections to the judgment entered and precludes them from raising them on cross-appeal.

In its Order, the district court ruled as follows with respect to the remittitur: "Plaintiffs will have 209 days from the date of this Order in which to accept or reject the remittitur. If they choose to reject the remittitur, a new trial will be ordered on all issues, because a trial on the issue of punitive damages alone would create undue confusion." (Emphasis added.) We hold that the district

court's remittitur embraced all issues considered in the case and that the Alley's acceptance of the remittited judgment waives their right to appeal these issues.

A party cannot accept a remittitur "under protest" and thereby appeal matters otherwise not appealable. Challenges similar to the Alleys, in which parties have attempted to appeal remittited judgments accepted under protest, have been repeatedly rejected. In Donovan v. Penn Shipping Co., Inc., 429 U.S. 648, 649-50 (1977) the Court succinctly stated:

> The Court of appeals properly followed our precedents in holding that a plaintiff cannot "protest" a remittitur he has accepted in an attempt to open it to challenge on appeal. A line of decisions streching back to 1889 has firmly established that a plaintiff cannot appeal the propriety of a remittitur order to which to which he has agreed. Kennon v. Gilmer, 131 U.S. 22, 29-30 (1889); Lewis v. Wilson, 151 U.S. 551, 554-555 (1894); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41, 52 (1895); Woodworth v. Chesbrough, 244 U.S. 79, 82 (1917).

> There are decisions in the Federal Courts of Appeals that depart from these unbroken precedents. Those decisions held or intimated that a plaintiff who accepts a remittitur "under protest" may challenge on appeal the correctness of the remittitur order.
>
> * * *
>
> The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is, however, a matter of federal law, see Hanna v. Plumer, 380 U.S. 460, 466-469 (1965); Byrd v. Blue Ridge Rural Electric Coop., 356 U.S. 525 (1958), and that law has always prohibited appeals in the situation at bar. The Court of Appeals for the Second Circuit correctly adhered to the consistent rule established by this Court's decisions. In order to clarify whatever uncertainty might exist, we now reaffirm the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted.

See also Dumbell Ranch Co., v. Cherokee Exploration, Inc., 692 F.2d 706, 709 (10th Cir., 1982) ("a party in federal court, whether his claim is based on federal or

state law, may not appeal from an order of remittitur he has accepted"). We hold that the Alleys', having accepted the remitted judgment under protest, cannot now appeal the court's remittur of punitive damages or denial of attorney fees and prejudgment interest.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 83-2415
83-2423
83-2424

BARBARA ANN ALLEY and W.H. ALLEY,

Plaintiffs,

vs.

GUBSER DEVELOPMENT CO., an Oklahoma corporation; NATIONAL GYPSUM COMPANY, a Delaware corporation d/b/a DMH COMPANY; WEYERHAEUSER COMPANY, a Washington corporation; and LOUISIANA-PACIFIC CORPORATION, a Delaware corporation,

Defendants.

Order from the United States Court of Appeals for the Tenth Circuit

Decided and Entered May Term, May 28, 1986

Before: Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Judge John P. Moore did not participate.

Robert L. Hoecker, Clerk

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-314

In The
Supreme Court of the United States
October Term, 1986

BARBARA ANN ALLEY and W. H. ALLEY,
Petitioners,

v.

GUBSER DEVELOPMENT COMPANY, NATIONAL GYPSUM COMPANY, and WEYERHAEUSER COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Tenth Circuit Court of Appeals correctly hold that the petitioners were precluded from appealing the district court's judgment because of their acceptance of a remittitur in order to avoid a new trial?

LIST OF PARTIES

All parties to the proceeding in the United States Court of Appeals for the Tenth Circuit are identified in the caption. Gubser Development Company has no parent, subsidiary, or affiliate companies. Aancor Holdings, Inc., a Delaware corporation, is the parent company of National Gypsum Company. National Gypsum Company has no subsidiaries other than wholly owned subsidiaries. The affiliates of National Gypsum Company are: Yeso Santa Rosalia, S.A. de C.V.; Lafarge Coppee, S.A.; CJC Group; Goldman Sachs & Co.; and Joseph A. Hardy, Sr.

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No. 86-314

In The

Supreme Court of the United States

October Term, 1986

BARBARA ANN ALLEY and W. H. ALLEY,

Petitioners,

v.

GUBSER DEVELOPMENT COMPANY, NATIONAL GYPSUM COMPANY, and WEYERHAEUSER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Gubser Development Company and National Gypsum Company respectfully request this Court to deny the petition for writ of certiorari of Barbara Ann Alley and W. H. Alley seeking review of the decision of the Tenth Circuit Court of Appeals that the petitioners' acceptance of the remittitur ordered by the district court precluded any appeal by the petitioners. That opinion is reported at 785 F.2d 849 (10th Cir. 1986).

STATEMENT OF THE CASE

Respondents disagree with petitioners' Statement of the Case in several respects and adopt instead the Tenth Circuit's discussion of Facts, Trial, Motions For Directed Verdict, and Post-Trial Motions in the opinion below which is included in Appendix B filed by the petitioners. There are, in addition, certain inaccuracies and omissions in petitioners' Statement of the Case which are particularly relevant to the determination of whether the petition for writ of certiorari should be granted.

Petitioners, who were the plaintiffs in the trial court, assert that the district court dismissed their claim for attorneys' fees under the Magnuson-Moss Warranty Act prior to trial. Pet. 8. On the contrary, a verdict was directed against the plaintiffs on this claim after the close of their case, based on the district court's finding that no evidence of property damage or direct damage had been presented. App. B at 14; R. Vol. XXII at 1450.

Furthermore, the plaintiffs have neglected to mention that the remittitur of punitive damages ordered by the district court was an alternative offered as a means for the plaintiffs to avoid the new trial which otherwise would have been ordered. The district court made clear in its order that should the plaintiffs choose to reject the remittitur of punitive damages, "a new trial will be ordered *on all issues*, because a trial on the issue of punitive damages alone would create undue confusion." App. A at 17-18 (emphasis added). The plaintiffs chose to accept the remittitur and obtain the benefits of the remitted judgment rather than relitigating in a new trial issues which they felt had been incorrectly decided by the district court. App. B at 21, 33. The Tenth Circuit explained

that because the district court's remittitur order "embraced all issues considered in the case," the plaintiffs' acceptance of the remitted judgment waived their right to appeal any of those issues, including the remittitur itself, the Magnuson-Moss Warranty Act claim, and the denial of prejudgment interest. App. B at 30-33.

ARGUMENT:

REASONS FOR DENYING THE WRIT

The Tenth Circuit Court of Appeals held that the plaintiffs could not appeal various rulings made by the district court because they had accepted the district court's remittitur order. The decision was based on the particular facts involved and on binding precedent from this Court. Far from presenting a case which necessitates an exercise of this Court's power of supervision over courts of appeals, the Tenth Circuit's decision was required by this Court's holding in *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977). Moreover, claimed conflicts among the various courts of appeals which have addressed this question arise entirely from the differing types of fact situations which their opinions have considered. The decision below simply does not present important legal principles which warrant the exercise of this Court's jurisdiction on writ of certiorari.

I. The Issue Raised Is Squarely Governed By This Court's Decision In Donovan v. Penn Shipping Co. Which Was Correctly Applied By The Tenth Circuit.

It is an established precept of federal procedural law that "a plaintiff in federal court . . . may not appeal from a remittitur order he has accepted." *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 650 (1977). This unequivocal authority was recognized by the Tenth Circuit and correctly applied in its decision in this case. App. B at 31-33. Although the plaintiffs are attempting to carve out exceptions to this procedural rule, the *Donovan* decision admits no such tinkering. The preclusion of appeals by plaintiffs who have accepted a remittitur applies without distinction to all issues encompassed by the remittitur order.

It is clear beyond cavil that the plaintiffs' acceptance "under protest" of the remittitur of punitive damages has no legal significance and did not reserve their right to appeal. *Donovan*, 429 U.S. at 649. Moreover, the prohibition against appeals by a plaintiff after acceptance of a remittitur is equally applicable to attempted cross appeals as direct appeals. Although the *Donovan* opinion addressed an attempted direct appeal by a plaintiff, the decision expressly reaffirms previous Supreme Court authority on remittitur practice including at least one case in which a cross appeal was barred. *Donovan*, 429 U.S. at 649-50.

For example, in *Woodworth v. Chesbrough*, 244 U.S. 79 (1917), a plaintiff who had accepted a remittitur in the lower court attempted to prosecute a "cross writ of error" after the defendant appealed. This Court, reason-

ing that the plaintiff should not be permitted to retract his consent to the remittitur and yet appeal the judgment which was entered only because of that consent, held that the cross writ must be dismissed. 244 U.S. at 82. The *Donovan* reaffirmation of *Woodworth v. Chesbrough* makes it crystal clear that the general procedural rule applies to cross appeals by accepting plaintiffs as well as direct appeals. *Donovan*, 429 U.S. at 649-50. Additionally, the circuit courts of appeals which have considered this question subsequent to the *Donovan* decision have uniformly agreed that no cross appeals can be permitted. *See Fiacco v. City of Rensselaer, New York*, 783 F.2d 319, 333 (2d Cir. 1986); *Consumers Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1099-1100 (3d Cir. 1986); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1145 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986); *999 v. C.I.T. Corp.*, 776 F.2d 866, 873 (9th Cir. 1985); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1541 (11th Cir. 1985); *Richards v. Allstate Insurance Co.*, 693 F.2d 502, 506 (5th Cir. 1982). Thus, the plaintiffs' argument that the prohibition against direct appeals does not extend to cross appeals simply does not hold water.[1]

Similarly, the plaintiffs' futile attack on the general practice of remittitur comes over one hundred and sixty years too late. The propriety of remittitur was officially recognized by Justice Story in *Blunt v. Little*, 3 Mason,

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[1] Respondents note that plaintiffs have based their argument on the erroneous assertion that at one time neither plaintiffs nor defendants could appeal after a remittitur had been accepted. Previous decisions of this court indicate that defendants' appeals have always been heard. *Chesbrough v. Woodworth*, 244 U.S. 72 (1917); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41 (1895).

102, 107 (1822) and the use of this device to remedy grossly excessive damages awards has been reaffirmed in decision after decision, culminating with the *Donovan* opinion in 1977. *See Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977) and cases cited therein; *Northern Pacific Railroad Co. v. Herbert*, 116 U.S. 642, 647 (1886); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 73 (1889). *See also Dimick v. Schiedt*, 293 U.S. 474, 482-85 (1935). Given this solid history, the plaintiffs' assertion that remittitur practice is based on "shaky precedents," Pet. 19, is utterly mystifying.

Accordingly, the decision of the court below that the plaintiffs' attempted appeals would not be heard was mandated by the unwavering decisions on the issue from this Court. The granting of the petition for writ of certiorari would not enlarge the body of legal knowledge as the issue raised has previously been decided.

II. There Is No Conflict Among The Circuit Courts Regarding The Effect Of Acceptance Of A Remittitur Order.

Plaintiffs contend that this Court should grant the petition for writ of certiorari because of the existence of a conflict among the circuit courts regarding appeals from accepted remittitur orders. Essentially, plaintiffs point to *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977), and argue that this and other circuit court decisions have permitted an appeal by a plaintiff who has accepted a remittitur. However, *Call Carl* and the other decisions cited by plaintiffs are clearly distinguishable from the instant case and do not establish a conflict among the circuits.

Each of the circuit court decisions cited by the plaintiffs involves a factual situation in which the district court ordered a new trial *solely on the issue of damages* unless the plaintiffs consented to a remittitur of the jury verdict. *See Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 625 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Baltezore v. Concordia Parish Sheriff's Dept.*, 767 F.2d 202, 208 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 817 (1986); *Aaro v. Daewoo International (America) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1541 (11th Cir. 1985). *See also Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (Plaintiff allowed to appeal ruling on equitable relief entered after a remitted jury verdict on damages had been accepted in order to avoid a new trial solely on the damages claim). In these cases, if the plaintiffs had rejected the remittitur and forced a new trial, they still would not have had the opportunity to relitigate the other issues they were appealing because the scope of the new trial would have been strictly limited to the amount of damages available on the claims on which the previous jury had decided in their favor. Claims which had been dismissed by the district court or on which directed verdicts had been entered could not be addressed in the second trial. Thus, the plaintiffs' acceptance of the remittitur was understandably not construed as their consent to the previous resolutions of separate issues and a waiver of their right to appeal those issues. *Aaro, Inc. v. Daewoo International (America) Corp.*, 755 F.2d at 1401.

The facts presented in the instant case differ on this crucial point from the cases relied upon by the plaintiffs.

Here, the district court's remittitur order specifically required a new trial on all issues considered in the case because a new trial on punitive damages only would have been too confusing. App. A at 17-18. If the plaintiffs had chosen to reject the remittitur, both the Magnuson-Moss Warranty Act claim and the issue of prejudgment interest would have been presented again to the district court for decision. New evidence on each of these issues could have been offered and additional arguments made to the court.[2] In choosing the remittitur to avoid a new trial which would have included these issues, the plaintiffs took the benefit of the remitted judgment and gave up their right to appeal.

This distinction among the various circuit court decisions is clearly supported by the rationale of *Donovan* and other Supreme Court decisions. This rationale was first discussed in *Woodworth v. Chesbrough*, 244 U.S. 79 (1917), one of the cases reaffirmed in the *Donovan* opinion. In that case, this Court characterized the acceptance of a remittitur as the condition through which the district court's final judgment was obtained. 244 U.S. at 82. A rejection of the remittitur by the plaintiff on the other hand would necessarily have forced a new trial and it is well established that "[a]n order granting a new trial is interlocutory in nature and therefore not immediately appealable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Only the plaintiff's accept-

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[2] As noted in Respondents' Statement of the Case, it was the district court's finding that no evidence of property or direct damage had been presented which led to the directed verdict against the plaintiffs on their Magnuson-Moss Warranty Act claim.

ance of the remittitur creates a judgment and an appealable order. *Woodworth v. Chesbrough*, 244 U.S. at 82. A plaintiff's attempt to contest the remittitur order on appeal after acceptance is seen as a withdrawal of consent to the remittitur, thus vitiating the judgment itself and returning the proceedings in the lower court to an unappealable status. *Id. See also* Note, *Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts*, 1975 Duke L.J. 1150, 1155-57; *Kennon v. Gilmer*, 131 U.S. 22, 29-30 (1889); *Lewis v. Wilson*, 151 U.S. 551, 554-55 (1894); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52 (1895).

The district court's remittitur order in this case required a new trial on all issues. The plaintiffs' acceptance of the remittitur, therefore, must be viewed as their consent to the judgment as entered on all issues.[3] These issues include the district court's directed verdict against the plaintiffs on their Magnuson-Moss Warranty Act claim because of the lack of evidence of property or direct damage, as well as the court's ruling that prejudgment interest would not be added to the judgment because of the plaintiffs' previous failure to request it as required by Colorado law. An attempt to appeal the district court's decision on any of those issues is, therefore, a withdrawal of consent to the remittitur which invalidates the judgment itself and precludes any appeal. The Tenth Circuit decision correctly recognized that the rationale of *Dono-*

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[3] Contrary to plaintiffs' assertions, a new trial does not necessarily include relitigation of all issues. *See* Pet. 15. Rule 59 of the Federal Rules of Civil Procedure expressly permits a federal district judge to grant a new trial on all or any part of the issues previously considered.

van and its predecessors prohibited the plaintiffs' appeals because of the all-inclusive scope of the remittitur order.

The theory espoused by the plaintiffs, that separate and distinct controversies can be appealed after acceptance of a remittitur, is addressed only in *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977). But, as explained above, that decision considered a case in which a new trial had been ordered on damages only unless the plaintiff accepted a remittitur.

Moreover, recent case law from the Fourth Circuit has apparently invalidated the decision in *Call Carl*. In *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 205 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983), the court of appeals held that a plaintiff who had accepted a remittitur could not challenge the district court's decisions or rulings which had preceded the jury verdict. The *Arnold* court reasoned that allowing such a cross appeal of an earlier ruling, such as a ruling on a motion for directed verdict, would permit direct circumvention "of the *Donovan* prohibition against remitting-plaintiff appellate challenges." 681 F.2d at 205 n.19. The court held that, in such a situation, the remitting plaintiff "is limited as appellee to defending . . . the judgment as entered and may not seek to enlarge her rights under it." *Id.* at 205. A contrary result would permit plaintiffs to attempt to enlarge their rights under the remitted judgment in spite of the long-standing prohibition against such a practice. *See United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924). Thus, the continuing viaibity of *Call Carl* even within the Fourth Circuit is subject to considerable doubt. A grant of certiorari to

review an alleged conflict based on mere factual distinctions and in which the petitioners' leading case has been effectively overruled would be an exercise in futility.

CONCLUSION

The previous Supreme Court authority on the question raised by the plaintiffs has provided adequate guidance to the courts of appeals in determining the correct result in the individual cases which have been presented to them. The differences in the circuit court decisions stem from the different types of factual situations involved. Properly rejected by the court of appeals in this case, the plaintiffs' theory does not merit this Court's consideration.

Respectfully submitted,

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